Office-Supreme Court, U.S.
FILED
JUL 11 1966
JOHN F. DAVIS, CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM 1966

No. 333

MAMIYE BROS., ET AL.,
Petitioners,

—against—

BARBER STEAMSHIP LINES, INC., ET AL.,
Respondents,

—against—

ATLANTIC STEVEDORING CO. INC., ET ANO.,
Respondents.

GELMART KNITTING MILLS, INC., ET AL.,
Petitioners,

—against—

BARBER STEAMSHIP LINES, INC., ET AL.,
Respondents,

—against—

ATLANTIC STEVEDORING CO. INC., ET ANO.,
Respondents.

ISAAC COHEN & SONS CORP., ET AL.,
Petitioners,

—against—

BARBER STEAMSHIP LINES, INC., ET AL.,
Respondents,

—against—

ATLANTIC STEVEDORING CO. INC., ET ANO.,
Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

VINCENT L. LEIBELL, JR.
Counsel for Petitioners
No. 99 John Street
New York, N.Y.

BIGHAM, ENGLAR, JONES & HOUSTON
of Counsel

TABLE OF CONTENTS

	PAGE
The Opinion Below	2
Jurisdiction	2
Question of Law Presented	2
Statement of the Case	2
Reason for Granting the Writ	7
A—The World Products Case	8
1. The Facts of the World Products Case	8
2. The Evidence for the Defendant in the World Products Case	8
3. The Evidence for the Plaintiff in the World Products Case	9
4. The Conclusion of Judge Augelli, and Its Affirmance By the Court of Appeals	10
B—The Reaction of Judge Wyatt to the World Products Case	11
C—Any Comparison of the Fact Situations Pertaining to the World Products Case and the Instant Ones Is Favorable to Petitioner's Position	12
D—The Comments of the Court of Appeals for the Second Circuit on the World Products Case	14
E—There Being No Substantial Distinction Between the Facts of The World Products Case and the Ones Which are the Subject of This Petition, the Judgments of the Courts of Appeal for the Third and Second Circuits, Respectively, Are in Conflict	15

PAGE

F—The Questions Here Involved Are of Basic Importance, Since Circumstances Analogous to Those Which Caused the Damage During Hurricane "Donna", Are Likely to Recur at Any Time in the Future, and Result in Serious Losses. Accordingly, the Final Resolution of These Conflicting Decisions is of Direct Concern to Many Interests Other Than the Parties to These Suits 16

Conclusion 18

Appendix:

Opinion of the United States Court of Appeals for the Second Circuit ..... App. 1

Judgment of the United States Court of Appeals for the Second Circuit ..... App. 16

Table of Cases Cited

General Public Warehouse Co. v. *Queen Line, Ltd.*, 177 F.Supp. 916 5

Great Atlantic & Pacific Tea Co. v. *Brasileiro* (2 Cir.), 159 F2 661, cert. den. 331 U.S. 836 ... 15

Romero v. *Garcia & Diaz, Inc.* (2 Cir.), 286 F2 347, cert. den. 365 U.S. 869 15

Sidney Blumenthal & Co. v. *Atlantic Coast Line R. Co.* (2 Cir.), 139 F2 288, cert. den. 321 U.S. 795 15

World Products, Inc. v. *Central Freight Service, Inc.*, 222 F.Supp. 849, affirmed 342 F2 290 7, 8, 9, 10, 11, 12, 14, 15, 17

IN THE

Supreme Court of the United States

OCTOBER TERM 1966

No.

MAMIYE BROS., ET AL.,

Petitioners

—against—

BARBER STEAMSHIP LINES, INC., ET AL.,

Respondents,

—against—

ATLANTIC STEVEDORING CO. INC., ET ANO.,

Respondents.

GELMART KNITTING MILLS, INC., ET AL.

Petitioners,

—against—

BARBER STEAMSHIP LINES, INC., ET AL.,

Respondents,

—against—

ATLANTIC STEVEDORING CO. INC., ET ANO.,

Respondents.

ISAAC COHEN & SONS CORP., ET AL.,

Petitioners,

—against—

BARBER STEAMSHIP LINES, INC., ET. AL.,

Respondents,

—against—

ATLANTIC STEVEDORING CO. INC., ET ANO.,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

To the Honorable, the Chief Justice of the United States and the Associate Justices of the Supreme Court of the United States:

Petitioners pray that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Second Circuit.

The Opinion Below

The opinion of the Court of Appeals for the Second Circuit affirming a judgment of the United States District Court for the Southern District of New York, has not as yet been officially reported. It and the judgment of affirmance are printed as an Appendix to this petition.

Jurisdiction

The judgment of the United States Court of Appeals is dated April 13, 1966 and was entered on the same day. The jurisdiction of this Court is invoked under 28 U.S.C. 1254 (1).

Question of Law Presented

Did Hurricane "Donna"—an act of God—exonerate a pier operator and an ocean carrier from all liability for the loss of goods, when (legally charged with knowledge of both the erratic nature of hurricanes in general, and the severity of "Donna" in particular) they failed to take any preventative action to protect the goods before voluntarily closing down the pier for a period of 63 hours, during which, as they well knew, they would be paralyzed to act?

Statement of the Case

Petitioners were the owners or consignees of goods, which were accepted by the respondent carriers in

apparent good order and condition. The goods were damaged by harbor water on September 12, 1960, during the passage of Hurricane "Donna", while on Pier 5, Bush Terminal, Brooklyn, New York. The carriers had no office (32a*) and no employees on the pier (34a). They chose to have all work on their behalf done by the impleaded terminal operator (33a).

Hurricane "Donna" was first observed on September 2, 1960 (216a). From its early stages the Weather Bureau warned that "Donna" was a severe hurricane (29a, 30a; 101a). It repeated this warning time and again (101a). The Weather Bureau also repeatedly warned, that when near land masses "Donna" was causing high tides (30a; 102a). It is the policy of the Weather Bureau to confine its advisories to a 24 hour period (15a; 98a).

There are two normal or astronomical high tides every 24 hours in New York harbor (129a). "Donna" struck New York harbor during one of these high tides (127a), and as a result the water reached a higher point than during any previous storm (129a, 130). However, the surge height of the water in New York harbor during "Donna" was considerably less than the surge height of water during the storm of November 25, 1950 (128a).

Since 1938 hurricanes along the east coast of the United States have been more frequent than in any other known period (103a). This has been due to a warming of the earth (103a). Seven hurricanes

---

* Figures followed by "a" refer to pages of appellant's appendix, Volume I of certified record.

Figures followed by "App." refer to appendix to this petition.

affected New York harbor between 1938 and 1960 (151).

A hurricane packs winds of more than 75 miles per hour, moving counterclockwise around a center, usually referred to as the eye of the storm (215a). No two hurricanes follow the same track (95a, 96a; 148a). They cross and recross in all directions (96a), and some will accelerate 1500 per cent in a 24 hour period (96a).

The climax of the hurricane season along the Atlantic Coast is the first 10 days of September (14a; 97a). In fact, in any September there is a 92 per cent chance that there will be at least one hurricane somewhere in the Atlantic, and a 42 per cent chance that there will be three or more (97a).

In September, hurricanes that develop in the Cape Verde region tend to recurve northward around the western edge of the "Bermuda High" (9a; 97a). "Donna" was a Cape Verde type of storm (8a). Recurvature in September, while not invariable, is more frequent than not (218a).

When a hurricane moves northward its speed and direction are more uncertain than when it is moving westward (14a). It is most difficult to forecast the point of recurvature (218a). Indeed, the forecasting of hurricanes is more an art than an exact science (14a).

The diameter of the destructive winds of a hurricane can be in excess of 300 miles (13a). The rise in the water level may begin when a hurricane is as

much as 500 miles away (100a). This is known as "hurricane surge" (100a), which is defined as the difference between the astronomical tide and the actual tide (215a, 216a).

"Donna" first showed a tendency to turn from a westerly to a northerly direction at 7:00 A.M. (E.S. time) on Friday, September 9, 1960 (108a, 109a; Exh. 1 at 187a). There was nothing unusual about "Donna" recurving at the point where it did recurve (105a). Other hurricanes had recurved to the north at points to the west of, or near, where "Donna" recurved (104a, 105a, 108a).

Atlantic Stevedoring Co. Inc., the terminal operator at Pier 5 and the impleaded respondent, learned of the existence of "Donna" during the early part of the week previous to Monday, September 12, 1960 (39a; 167a). It knew that "Donna" was a very severe storm accompanied by high tides (167a, 168a). It knew that September is part of the hurricane season along the Atlantic seaboard (40a), and that "several years in a row we had a lot of them" (40a). Indeed, the terminal operator was charged with knowledge of the erratic nature of hurricanes. *General Public Warehouse Co.* v. *Queen Line, Ltd.*, 177 F.Supp. 916, 920, 921.

Pier 5 had been flooded over during previous storms (224a). The terminal operator was also charged with knowledge of this important fact. Official Government statistics, readily available to anyone, reveal that Pier 5, which is 10 feet above mean low water (221a), was seriously threatened during several prior storms when the harbor water rose to

dangerous heights (Exhs. 9 and 10 at 190a, 191a, 192a).

Had the terminal operator been watching the progress of "Donna" on Friday, September 9th—as was its duty—it would have known that "Donna" first turned from a westerly course to a northerly one at 7:00 A.M. that morning (108a, 109a)—some 9 hours before Pier 5 was voluntarily closed for a 63-hour period.

Why then did the terminal operator voluntarily close down the pier for a 63-hour period—during which it knew it would be paralyzed to act? The answer was given by the terminal operator itself, when it conceded that it was company policy to take hurricane precautions only after receiving official information that a hurricane would hit New York City (41a, 42a). The New York Weather Bureau expert-witness for the carrier stated that no such warning would be given until a hurricane was just south of Cape Hatteras (138a). He acknowledged, that with a hurricane accelerating to the northeast at the rate of 40 miles per hour, it would take only 8 hours for it to go from Cape Hatteras to New York (141a).

By a favorable coincidence one vessel was partially discharged of cargo on Friday, September 9th (222a), while another was being loaded (222a). According to the terminal manager, had the cargo from the discharging vessel been placed on a base three pallets high on Friday, it would only have taken an additional five or six hours to place the remaining cargo on a similar base (171a). Again, according to the terminal manager, had the loading of the second vessel been

completed on Saturday, the entire cargo might have been loaded by that night (172a). The pier had been worked in the past "many times" on Saturdays, and "plenty of times" on Sundays (174a). Accordingly, it was not a lack of available work which prevented the terminal operator from operating the pier on Saturday and/or Sunday. The sole reason for the failure to do anything to protect the cargo, was the terminal operator's adherence to its predetermined and negligent policy of doing nothing until official information was received that a hurricane would hit New York (41a, 42a).

Reason for Granting the Writ

The position taken by the Court of Appeals for the Second Circuit, in upholding the conclusion of the Trial Judge that the respondents and impleaded respondents were not negligent in failing to take any steps to protect the cargo prior to the day "Donna" struck New York harbor, is in direct conflict with the position taken by the Court of Appeals for the Third Circuit, in upholding the contrary conclusion of a Trial Judge involving the same hurricane "Donna" in the same harbor of New York.

Three months before these consolidated admiralty suits were tried before Judge Wyatt of the Southern District of New York, the non-jury case of *World Products, Inc.* v. *Central Freight Service, Inc.*, 222 F. Supp. 849 was decided in favor of the plaintiff by Judge Augelli of the District of New Jersey. About three months before Judge Wyatt filed his opinion, the Court of Appeals for the Third Circuit, at 342 F2

290, affirmed Judge Augelli's conclusion that, a warehouseman who stored goods on a pier during Hurricane "Donna", was negligent in failing to make any effort to protect the goods from rising waters.

A.

The World Products Case.

1. The Facts of the World Products Case:

The defendant's warehouse was located on a pier over the Hudson River at Edgewater, New Jersey. This place is about eight miles from Pier 5, Bush Terminal. Plaintiff's pipe fittings in the warehouse were damaged by rising river water during Hurricane "Donna" on September 12, 1960. At the time the pipe fittings were stored on approximately four inches of dunnage.

2. The Evidence for the Defendant in the World Products Case:

Judge Augelli, at page 852 of his opinion summarizes the defendant's evidence as follows:

> "In order to rebut the presumption of negligence on its part, defendant introduced evidence that the flooding of its Edgewater warehouse could not have reasonably been guarded against or anticipated. The testimony was that during the seven years defendant occupied the warehouse prior to 'Donna', the river tide had never risen to the level of the warehouse floor; that 'Donna' was the first hurricane to pass within 50 miles of New York in those seven years; that no sufficient

warning was given by the Weather Bureau concerning the high tides; that even if defendant had adequate warning, it could not have moved plaintiff's merchandise in time because of the lack of available storage space and the total volume of other merchandise on the floor; and that increasing the dunnage would have been futile because of the height attained by the flood water in the building."

3. The Evidence for the Plaintiff in the World Products Case:

Judge Augelli, also on page 852 of his opinion, summarizes the plaintiff's evidence as follows:

"On the other hand, there was testimony, favorable to plaintiff, that as much as 70% of the first floor of the Edgewater warehouse was, at normal high tide, three to four feet above the water of the Hudson River; that defendant should not have stored goods over the river without making an investigation of the tides in the area during storms; that such an investigation would have disclosed that on a number of occasions prior to 'Donna', the waters of the Hudson must have risen to or above the level of the warehouse floor; that defendant received adequate warning, a day or two before, that a hurricane was moving up the Atlantic Coast; that defendant should have been aware of Weather Bureau Reports from New York City, about twelve hours before the full force of the hurricane struck Edgewater, concerning the approach of the storm and the forecasted high tides; that

defendant took no precautions to protect the goods in the warehouse from flood damage either before or after it learned of the approaching hurricane; and that the use of additional dunnage by the defendant would have mitigated or avoided the loss, but was not attempted.'"

4. The Conclusion of Judge Augelli, and Its Affirmance By the Court of Appeals:

After noting that Hurricane "Donna" qualified as an act of God, Judge Augelli correctly stated that:

> "* * * the question still remains whether the storm was the sole cause of the damage to plaintiff's goods. In other words, if defendant did not exercise reasonable care in storing plaintiff's fittings, and if that failure was a proximate cause of plaintiff's loss, then defendant would not be relieved of liability by the Act of God". (Judge Augelli's Opinion, pp. 851 and 852)

After applying this law to the above quoted facts, Judge Augelli concluded that the defendant was negligent in not taking sufficient precautions to protect the goods.

In affirming the conclusion of Judge Augelli on the question of negligence, the Court of Appeals for the Third Circuit, at 342 F2 290, 291 stated:

> "We agree with the conclusions of the court below on the liability of defendant and on the validity of the limitation of liability provision of the warehouse receipt. On this we can add nothing to the reasons well stated by Judge Augelli in his opinion reported in 222 F.Supp. 849".

B.

The Reaction of Judge Wyatt to the World Products Case.

Judge Wyatt in a special section of his opinion labelled "The World Products decision" (231a, 232a) said: "There appear to be distinctions in fact between that case and the case at bar". Then after noting what he conceived to be two distinctions (we shall discuss each in the following paragraphs) the Judge added, "If there are no valid distinctions in fact between the two cases, then I must respectfully disagree with the result reached in the World Products case" (232a).

The first factual distinction Judge Wyatt perceived between the World Products case and the instant cases was that the floor of the Edgewater warehouse pier "was 7.6 to 8.6 feet above mean low water whereas Pier 5 was 10 feet above mean low water" (231a). Accordingly, the Edgewater pier was 2.4 to 1.4 feet lower than Pier 5.

This difference in height between the two piers could not have been significant enough to warrant different conclusions. Obviously, a pier eight miles up the Hudson River at Edgewater would not face the same menace from wave action and storm surge as a pier in Brooklyn with a wide expanse of water in front of it. And this is exactly how it turned out during Hurricane "Donna". At Edgewater "The tide waters of the Hudson River rose about four feet above the mean high water mark, and entered the first floor of defendant's main Edgewater warehouse", 222 F.

Supp. 849, 850. (Judge Augelli found that 70% of the Edgewater Pier was three to four feet above water at normal high tide, 222 F. Supp. 849, 852). On the other hand, Judge Wyatt found in connection with Pier 5 that "* * * the evidence is that water came up on September 12 to a height of 22 to 36 inches above the floor" (230a).

Therefore, in both theory and in practice there were good reasons why the Edgewater pier did not have to be as high as Pier 5.

The second factual distinction Judge Wyatt perceived between the World Products case and the instant cases, he described as follows:

> "The Court (Judge Augelli) also found that 'on a number of occasions prior to 'Donna', the waters of the Hudson must have risen to or above the level of the warehouse floor' (222 F. Supp. at 852)" (231a, 232a).

Certainly, the prior flooding of the Edgewater pier provides no distinction from the situation at Pier 5, because Judge Wyatt found as a fact that Pier 5 had also been flooded during prior storms (224a).

C.

Any Comparison of the Fact Situations Pertaining to the World Products Case and the Instant Ones Is Favorable to Petitioner's Position.

Pier 5 Bush Terminal was an operating pier, with all the mobility that implies. It "would support

cargo weight of about 4000 tons" (222a), but at the close of business on Friday, September 9 the pier was occupied by cargo weighing only about 2500 tons (222a). It had an asphalt roadway, 50 to 60 feet wide, down the center (222a), and it was large enough so that "Four ships could tie up alongside the pier at any one time" (222a).

The Edgewater pier was used solely as a warehouse. Because of the total volume of merchandise on the floor it could not be moved due to a lack of available storage space.

Unlike the warehouseman on the Edgewater pier, Atlantic Stevedoring Co. on Pier 5 had the unique advantage of an opportunity to take preventive measures while the "Toreador" was unloading on Friday, September 9th. In addition, it could have completed loading the "Turandot" on Saturday, September 10th.

It is certainly much easier, and less expensive, to place discharging cargo on a high base of pallets than it is to place additional dunnage under goods already tightly stowed in a warehouse. As Judge Wyatt sensed, there are no valid distinctions between the two cases (unless, as we claim, they are favorable to these petitioners).

D.

The Comments of the Court of Appeals for the Second Circuit on the World Products Case.

Despite appellants strong reliance upon the *World Products* case, the Court of Appeals confined itself to the following inadequate comment:

> "Although Judge Wyatt pointed to some differences of fact between the two cases, see 241 F. Supp. at 119, determination whether these or others were significant would require us to engage in a scrutiny of the record of *World Products* as thorough as we have made of the record here. In view of the firm conclusion we have reached after full consideration of this well tried and well argued case, we do not believe that effort would be rewarding" (15 App.)

It was not necessary for the Court of Appeals for the Second Circuit "to engage in a scrutiny of the record of *World Products* as thorough as we have made of the record here" (15 App.). Judge Augelli in his opinion in *World Products, Inc.* v. *Central Freight Service, Inc.*, 222 F. Supp. 849, 852, gave an exceptionally detailed summary of both the plaintiff's and defendant's evidence before reaching his conclusion of negligence. If the reasoning of the Court of Appeals for the Second Circuit were to be considered valid, there would be little chance for this Court to resolve conflicts between the Circuits, because few Courts of Appeal are likely to scrutinize the records of cases decided in other circuits.

E.

There Being No Substantial Distinction Between the Facts of The World Products Case and the Ones Which are the Subject of This Petition, the Judgments of the Courts of Appeal for the Third and Second Circuits, Respectively, Are in Conflict.

Hurricane "Donna" was the "act of God" considered in both the Second and Third Circuit cases. The damaged goods in both cases were located on piers in the same harbor of New York. Obviously, the same weather reports were available to the pier operators of both piers, each of whom—despite previous floodings of their piers—failed to take any preventative steps to protect the goods in their custody prior to the day of "Donna's" arrival. Yet, in the Third Circuit the pier operator was held to be negligent, while in the Second Circuit it was held to be not negligent.

A determination of negligence—or the absence of negligence—is a conclusion of law. *Romero* v. *Garcia & Diaz, Inc.* (2 Cir.), 286 F2 347, 355, cert. den. 365 U.S. 869; *Great Atlantic & Pacific Tea Co.* v. *Brasileiro* (2 Cir.), 159 F2 661, 665, cert. den. 331 U.S. 836; *Sidney Blumenthal & Co.* v. *Atlantic Coast Line R. Co.* (2 Cir.), 139 F2 288, cert. den. 321 U.S. 795. In fact, in the cases which are the subject of this petition, the Court of Appeals for the Second Circuit, once again reaffirmed this principle of law (8, 9 App.). Accordingly, a situation has been created where the Second and Third Circuits have reached conflicting conclusions concerning an important matter of law—negligence.

F.

The Questions Here Involved Are of Basic Importance, Since Circumstances Analogous to Those Which Caused the Damage During Hurricane "Donna", Are Likely to Recur at Any Time in the Future, and Result in Serious Losses. Accordingly, the Final Resolution of These Conflicting Decisions is of Direct Concern to Many Interests Other Than the Parties to These Suits.

The frequency of Atlantic hurricanes in recent years, makes it reasonable to assume, that the most highly industrialized area in the world, can expect similar visitations in the years to come. Is the New York harbor pier operator of the future to be guided by a common rule of law, or does the applicable rule of law depend upon the mere circumstance of his location on either the east or west side of the harbor (the territories of the Second and Third Circuits, respectively)? Or, to put it another way, when a pier operator in New York harbor knows of the existence of a raging Atlantic hurricane, at the peak of the September hurricane season, is he legally justified in doing nothing before receiving official notice that the storm will strike New York (a matter of some eight hours notice) or must he take some prior preventative steps?

Petitioners believe that the Second and Third Circuits cannot both be correct. Judge Wyatt seemed to recognize the essential factual similarity between the two cases, when he frankly stated, "If there are no valid distinctions in fact between the two cases, then I must respectfully disagree with the result reached

in the World Products case" (232a). The Court of Appeals for the Second Circuit in a footnote comment said, "Although we do not here follow what claimants assert the Third Circuit's decision to be, we ought to be in a position to compel a district court to follow a sister circuit's conclusion with respect to negligence in similar circumstances if we were so advised" (7 App.).

While, of course, one circuit cannot be forced to follow a sister circuit's conclusion on an issue of negligence, this Court has the historic right to enforce uniformity. As matters now stand it cannot be reasonably and fairly said that the facts of the *World Products* case compel one conclusion on negligence, while the facts of the instant cases compel a contrary conclusion. On the face of it, one circuit or the other must be wrong. A perpetuation of the error, wherever it may be, can only lead to confusion in the future, when that inevitable phenomenon of nature and act of God—the hurricane—strikes again, causing tremendous financial losses.

CONCLUSION

By reason of the premises, a writ of certiorari should issue to review the decision of the Court of Appeals herein.

Dated: July 8, 1966.

Respectfully submitted,

VINCENT L. LEIBELL, JR.
Counsel for Petitioners
No. 99 John Street
New York, N.Y.

BIGHAM, ENGLAR, JONES
& HOUSTON
of Counsel

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

No. 155—September Term, 1965.

(Argued December 14, 1965 Decided April 13, 1966.)

Docket No. 29939

MAMIYE BROS., *et al.*,

Libellants-Appellants,

—v.—

BARBER STEAMSHIP LINES, INC., *et al.*,

Respondents-Appellees and Cross-Appellants,

—v.—

ATLANTIC STEVEDORING CO. INC., *et ano.*,

Impleaded-Respondents —Cross-Appellees.

GELMART KNITTING MILLS, INC., *et al.*,

Libellants-Appellants,

—v.—

BARBER STEAMSHIP LINES, INC., *et al.*,

Respondents-Appellees and Cross-Appellants,

—v.—

ATLANTIC STEVEDORING CO. INC., *et ano.*,

Impleaded-Respondents —Cross-Appellees.

ISAAC COHEN & SONS CORP., *et al.*,

Libellants-Appellants,

—v.—

BARBER STEAMSHIP LINES, INC., *et al.*,

Respondents-Appellees and Cross-Appellants,

—v.—

ATLANTIC STEVEDORING CO. INC., *et ano.*,

Impleaded-Respondents —Cross-Appellees.

Before:

WATERMAN, FRIENDLY and KAUFMAN,

Circuit Judges.

Appeals from a decree of the District Court for the Southern District of New York, Inzer B. Wyatt, *Judge*, 241 F. Supp. 99 (1965), dismissing libels against carriers to recover for hurricane damage to cargo on a Brooklyn pier. Affirmed.

VINCENT L. LEIBELL, JR. (Bigham, Englar, Jones & Houston, New York, N. Y.; Charles W. Harvey and Christopher R. Knauth, of Counsel), *for Libellants-Appellants.*

ELI ELLIS (Hill, Betts, Yamaoka, Freehill & Longcope, New York, N. Y.; Robert H. Peterson and Robert W. Mullen, of Counsel), *for Impleaded-Respondents—Cross Appellees.*

TALLMAN BISSELL (Haight, Gardner, Poor & Havens, New York, N. Y.; Thomas R. H. Howarth and Philip V. Moyles, of Counsel), *for Respondents-Appellees and Cross-Appellants.*

FRIENDLY, *Circuit Judge*:

These libels, consolidated for trial before Judge Wyatt in the District Court for the Southern District of New York, see 241 F. Supp. 99 (1965), were brought to recover for damage to cargo on Pier 5, Bush Terminal, Brooklyn. The cause of the damage was a flooding of the pier due to storm surge and wave action created by Hurricane Donna which struck New York harbor in the early afternoon of Monday, September 12, 1960. The pier was 10′ above mean low water, as against 9′ required by New York City, but the unusually high level of the water covered the floor to a considerable height.[1] Some of the cargo was inbound, having been unloaded on or before Friday, September 9, from the M/V Toreador, the M/V Tatra and the M/V Turandot; other cargo was outbound, having been delivered on or before September 9 for shipment on the Turandot and the Tatra. The respondent shipowners impleaded Atlantic Stevedoring Co., the pier operator, which carried the burden of the defense. After trial Judge Wyatt dismissed the libels on the ground that the loss was attributable to an "Act of God" within the meaning of the Carriage of Goods

---

[1] According to Judge Wyatt's calculations, all cargo on the floor of the pier would have been in 8″ to 9″ of water, and cargo on a single pallet in 2″ to 3″, but wave action must have raised the water level on the pier as high as 36″. 241 F. Supp. at 115.

by Sea Act, 46 U. S. C. §1304(2)(d).[2] In a thorough opinion, he recognized that under the statute the carriers and pier operator were liable for damage to the cargo caused by their negligence and had the burden of showing either freedom from negligence or that the loss could not have been prevented by the exercise of reasonable care. He held, however, that in view of the Weather Bureau estimates as to the probable course of the hurricane they had not been negligent. On appeal no one challenges his analysis of the governing legal principles; the attack by the cargo owners is on the correctness of his conclusion that the burden of negating negligence was satisfied.

I

We are confronted at the outset by appellees' contention that the only issue before us is whether the district court's conclusion of lack of negligence was clearly erroneous. Appellees recognize the many decisions of this court which hold that, with respect to negligence as distinguished from the evidentiary facts on which it is based, a judge's determination is not entitled to the benefit of the "unless clearly erroneous" rule either in admiralty or in actions governed by F. R. Civ. P. 52(b); they suggest, however, that most of these cases antedated *McAllister* v. *United States*, 348 U. S. 19 (1954), and that in any event they cannot stand in the face of that decision.

---

[2] The court held that under the agreements of carriage COGSA was to determine rights and duties with respect to both inbound and outbound goods on the pier. 241 F. Supp. at 105-06. This decision is not here challenged.

The attempt to whittle down the precedents in this court must fail. In *Romero* v. *Garcia & Diaz, Inc.*, 286 F. 2d 347, 355-56, cert. denied, 365 U. S. 869 (1961), where we adhered to our long-standing rule, we cited three earlier post-*McAllister* decisions in which this court, speaking through eminent judges, had done precisely that. *Dale* v. *Rosenfeld,* 229 F. 2d 855, 858 (1956) (Swan, *J.*); *New York, N. H. & H. R.R.* v. *Gray,* 240 F. 2d 460, 465 (Frank, *J.*), cert. denied, 353 U. S. 966 (1957); and *Verbeeck* v. *Black Diamond S.S. Corp.,* 269 F. 2d 68, 70 (1959) (Clark, *J.*), cert. denied, 361 U. S. 934 (1960). To this list we can now add *Kane* v. *Branch Motor Express Co.,* 290 F. 2d 503, 506-07 (1961), and, dealing with a somewhat different but related subject, *Ellerman Lines, Ltd.* v. *The S.S. President Harding,* 288 F. 2d 288, 291-92 (1961). We find nothing to the contrary in *Castro* v. *Moore-McCormack Lines, Inc.,* 325 F. 2d 72, 75 (1963); rather that opinion recognized our established rule. However, the recurrent arguments on this point and the earnestness of appellees' presentation make further consideration appropriate.

The standard explanation of our rule was stated in *Romero* as follows: "determination of negligence involves first the formulation and then the application of a standard of conduct to evidentiary facts bound to be established. When all this has been done by a judge, a reviewing court has no means of knowing whether he formulated the standard correctly, since he does not charge himself. Thus there must be free review of his ultimate determination of negligence although not of the facts on which it was based." See also *Kane* v. *Branch Motor Express Co., supra,* 290 F. 2d at 506-07. Appellees say in effect, although they phrase it more politely, that this is mumbo-jumbo.

Since every first-year law student knows what the standard of care is, how can an appellate court seriously wonder whether an experienced trial judge was aware of it? Particularly, how can any doubt be entertained on this score if the judge has correctly repeated the familiar formula? Does it not then follow that what the appellate court is attempting to oversee, at least in most cases, is the interpretation of particular circumstances in the light of a known rule of law? Is not such work the proper business of the trial courts, subject to review only under the "unless clearly erroneous" standards? And, however the argument on principle might stand, is not this what the Supreme Court decreed in *McAllister*?

The argument on principle makes many over-simplifications that fail to take into account the elaborations of the general standard of care and the need for consistency in judicial decision. Of course we do not doubt the knowledge of the district judges that the overall standard of conduct to which an actor "must conform to avoid being negligent is that of a reasonable man under like circumstances." ALI, Restatement (2d), Torts §283 (1965). But this is a long way from being the whole story. That simple phrase in the Restatement is accompanied by two pages of explanation; twenty-five more sections, §§285-309, with comment spreading over eighty pages, are devoted to further specifications of the general standard. The law of negligence has thus followed the path anticipated in the celebrated passage of Holmes' lectures of 1881, fulfilling "the tendency . . . to become more and more concrete by judicial decision and by statute" without interfering with "the general doctrine maintained as to the grounds of liability." The Common Law 89-103 (Howe ed. 1963). This very case presents

issues whether the judge gave adequate weight to the principle that "As the gravity of the possible harm increases, the apparent likelihood of its occurrence need be correspondingly less," Prosser, Torts 151 (3d ed. 1964), and whether, as appellants claim, he acted on the erroneous view that unless all the cargo could be protected from damage, none needed to be. Save when the trial judge has gone to unusual lengths in his opinion, the only way in which an appellate court can determine whether he correctly apprehended these manifold specifications of the general standard is by reviewing his result, and if that review is to be effective, it must be unimpeded. Beyond this the need for consistency militates against considering a judge's application of even an admitted legal standard as a finding of "fact" subject to F. R. Civ. P. 52(b) or its admiralty analogue, even though a jury's doing the same would constitute a determination of "fact" protected by the Seventh Amendment. It would be shocking if contrary decisions of two district judges in this circuit on the self-same facts had to be left standing, although there would be no similar shock if such a divergence should happen as a result of the deliberation of two different juries. Compare *United States* v. *Maybury*, 274 F. 2d 899 (2 Cir. 1960). Yet uniformity within a circuit or among circuits[3] can be achieved only if appellate review of the application of a legal standard is free of the shackles of the "unless clearly erroneous" rule.

---

[3] As will be seen from the final paragraph of this opinion, claimants suggest it would be shocking if the Second and Third Circuits were to reach what they contend to be different results. Although we do not here follow what claimants assert the Third Circuit's decision to be, we ought to be in a position to compel a district court to follow a sister circuit's conclusion with respect to negligence in similar circumstances if we were so advised.

This leaves the question whether *McAllister* compels a conclusion that our decisions are wrong as a matter of authority, however wise we may think them to be on principle. What proved to be the crucial issue in that case was not negligence, as to which this court had indicated a somewhat hesitant willingness to go along with the district judge's conclusion, but causation, see 207 F. 2d 952, 954-55 (2 Cir. 1953); with respect to that question, this court, speaking through Judge A. N. Hand, did not specify what standard of review it was using. The brief opinion of Mr. Justice Minton assumed that we had applied the "unless clearly erroneous" standard, saying "We do not find that the Court of Appeals departed from this standard, although we do disagree with the result reached under the application of the standard." 348 U. S. at 20. Taking this literally, one could argue that the decision laid down no legal doctrine at all but simply resolved a controversy over facts in favor of the view taken by the district judge. See Staring, Appeals in Admiralty Cases, 35 Tulane L. Rev. 1, 47-50 (1960). But it can be answered that since the Supreme Court ought not to have reversed us if in fact our power went beyond the rejection of a clearly erroneous finding, the Court necessarily decided that causation was a question of "fact" on which the decision of a district court was reviewable only for clear error. Accepting this broad reading for present purposes, we note that the issue in *McAllister* was simply whether the plaintiff had borne his burden of showing the probability that defendant's negligence rather than other circumstances caused the injury, as distinguished from questions of causation involving a mixture of law and fact such as whether the negligence was the "proximate" or "legal" cause. Finding no discussion in the Supreme

Court's opinion directed at what could be considered application of a legal standard to established facts, we adhere to our long-held view that a judge's determination on the issue of negligence does not fall within the "unless clearly erroneous" rule.

II.

Hurricane Donna was first identified on September 2, 1960, as a severe hurricane several hundred miles east of Puerto Rico, but no one then regarded her as presenting any immediate threat to the northeastern United States. In the following week she moved slowly, in a generally westerly direction, passing north of Puerto Rico and Cuba and aiming toward the Florida keys and thence into the Gulf of Mexico. However, hurricanes on this general course are often subject to a phenomenon known as recurvature—a turn to the north or northeast as a result of encountering southerly and westerly winds near the western end of the Bermuda High, a large high pressure area of varying length which extends west from the Azores. The point at which recurvature occurs, whether off the east coast of the United States or in the Gulf of Mexico, depends on the length of the Bermuda High which tends to shorten progressively from August through the fall months; when recurvature occurs, the hurricane not only changes direction but accelerates from a speed of some 12 miles per hour to several times that rate.

According to the Chief of the National Hurricane Center, a specialized research and warning service of the United States Weather Bureau stationed at Miami, Donna's recurvature began at 7:00 A.M. EST on Fri-

day, September 9, "when it changed from a predominantly western trajectory, first to west-northwest and later to northwest." However, the "advisories" issued by the Weather Bureau during that day did not make alarming news out of this; the 5 P.M. advisory, noting the north-northwest course and the reduced speed of 9 mph, predicted "no material change . . . in intensity, speed or direction during the next 12 hours," and the 11 P.M. advisory went only so far as to forecast that "the direction of movement will likely change to slightly more northerly." In fact, until late in the evening of Saturday, September 10, the Hurricane Center expected that over the weekend Donna would pass up the Gulf of Mexico some 60 or 70 nautical miles west of Tampa, cross the Florida coast near Cedar Key, and then move northeast off Cape Hatteras by early Monday. Instead, the center of the hurricane hugged the west coast of Florida only as far as the Tampa area, then turned northeast across the state, and moved up the Atlantic Coast at a considerably greater speed than the experts anticipated. No Weather Bureau report extending hurricane warnings to include New York was issued until Sunday, September 11, at 10 P.M. EDT; although this correctly estimated that Donna would reach the latitude of New York on Monday morning, it erroneously predicted her passage a short distance off the eastern end of Long Island. Later, at 11:55 P.M., the New York Weather Bureau issued a local statement warning that tides on Monday morning might be as high as 5′ to 8′ above normal from the northern New Jersey shore to Long Island; the following morning's report repeated this forecast but added that in New York harbor tides would be about 3′ to 4′ above normal. In fact, traveling somewhat west of the anticipated course, the "eye"

of the hurricane brushed the New Jersey shore, and between 2:30 and 3:30 P.M. on September 12 passed over central Long Island. The ensuing storm surge in New York harbor was unusually great because of the unprecedented width of the eye and the proximity of its northeastern quadrant where surge is maximized. With Donna hitting exactly at the time when the astronomical tide reached its peak of 4.5′, New York harbor experienced the highest recorded water level in its history some 10.7′ to 10.9′ above mean low water in the area of the Bush Terminal.

The claimants do not criticize the conduct of the pier operator once the Sunday evening advisories had been issued. The terminal superintendent got down early on Monday morning and, finding that the Turandot and the Tatra refused to open their hatches for loading because of heavy rain, put the stevedores who had been ordered for 8 A.M. to work in nailing up doors, affixing tarpaulins, and placing additional pallets under cargo; only some 3% to 5% of the cargo had been raised by extra pallets when the flooding occurred. What the claimants do criticize is the operator's failure to take precautions before then. Their case centers on the point that under the practices of the Waterfront Commission labor for Saturday, Sunday and Monday must be ordered by 3 P.M. on Friday.[4] They say that a pier operator who closes down his pier knowing he will be immobilized

[4] The terminal superintendent testified that matters were not quite this inflexible; that if he had learned of the danger by 6 P.M. on Friday, he "could have done something about it," but that by Saturday morning he "could not have done very much." Apparently the difficulty is that hiring must be in accordance with seniority schedules which cannot be altered without approval of the Waterfront Commission and/or the union.

for 63 hours must take substantially greater precautions than one who will regain freedom of action in fifteen. The prudent course under the circumstances, they urge, would have been to hire men for the weekend, place extra pallets under the inbound cargo unloaded on Friday or, at least, so much of it as could be feasibly protected in that fashion, and load the outbound cargo on Saturday and Sunday. They say that, despite the lack of official warnings, such action was demanded by a combination of the known severity of Donna, a history of some previous flooding, the unpleasant habit of hurricanes to recurve and threaten the northeast, particularly in early September, and the unpredictability of their course and speed once recurvature has set in.[5] Even conceding that reliance on Weather Bureau warnings is a reasonable course of conduct for a pier operator who will resume business on the following morning, the claimants stress that the forecasts are confined to a 24-hour period; they say that when a person disables himself from acting for longer than that, he must bear the consequences of what may have seemed only a slight risk at the time of decision. Though we agree that the irreversible character of a decision is highly relevant to the risk, we concur with the district judge that the pier operator did not fail to exercise the care it was bound to take with the knowledge it had or ought to have had before closing down on Friday.

---

[5] The Chief of the National Hurricane Center conceded that a book, "Atlantic Hurricanes," of which he was co-author, stated that "hurricanes slow, speed up and slow again, and they move towards the west, turn towards the northwest or north for a day or so, resume a westward course, make right angle turns, loop the loop and do all the things a good broken-field football carrier will do."

An actor is required to know "the qualities, characteristics, and capacities of things and forces in so far as they are matters of common knowledge at the time and in the community," Restatement (2d), Torts §290(a). This will suffice unless he is "engaged in an activity, or stands in a relation to others, which imposes upon him an obligation to investigate and find out, so that he becomes liable not so much for being ignorant as for remaining ignorant." Prosser, Torts 163 (3d ed. 1964). The pier operator clearly met the less stringent test; there was no general knowledge in the New York community of the probable approach of Donna until Sunday evening. And even if the claimants are right in saying that the situation on Friday afternoon had sufficient elements of danger that the operator should have made further inquiry before immobilizing itself for 63 hours, there is no evidence that the knowledge which it would thus have obtained and with which it must be charged should have led to a different course of conduct. If the operator had communicated with the meteorologist in charge of the New York Weather Bureau, it would have learned that, as he later testified, he was not then "very excited about it [Donna] affecting the New York City area, especially over the weekend." If it had gone still further and telephoned the Chief of the Hurricane Center at Miami, it would have found he expected that the center of the hurricane would be on the West Florida Coast on Saturday evening and, had he been able to anticipate a forecast in fact made the next day, that on Sunday evening it would lie somewhere between Savannah, Georgia, and Charleston, South Carolina. Neither expert would have predicted that by Sunday evening Donna would be over North Carolina, racing northeastward on a course likely to take her dangerously

near New York harbor by Monday afternoon. To be sure, if cross-examination had been pursued further, the experts might have conceded that their predictions could not be guaranteed beyond a short period, and that in consequence no one could say there was no risk whatever of Donna's approaching New York on Monday. But even if the operator should be charged with the results of so thorough an inquiry, an assumption that may well go beyond the bounds of realism, it was not unreasonable to fail to take special action on Friday afternoon.

In appraising the operator's conduct, it is necessary to resist the strong human temptation to review action by looking backward "with the wisdom born of the event," *Greene* v. *Sibley, Lindsay & Curr Co.*, 257 N. Y. 190, 192 (1931). Though the unlikelihood of the risk must be factored upward by its gravity, see Prosser, Torts 150-51 (3d ed. 1964), nothing the operator knew or could have known on Friday should have led it to believe that the risk of the concatenation of adverse circumstances which actually occurred was sufficiently appreciable to call for emergency precautions entailing substantial expense[6] The likelihood, indeed the fact, of recurvature of Donna was by no means synonymous with a significant risk of her hitting New York; only five hurricanes had seriously affected New York since 1938 and none since 1900 had come from the area where Donna was on Friday. And even the possibility of her striking New York did not portend arrival at a time coinciding with the normal high tide and passage at a point neither to the west of

[6] Labor on Saturday and Sunday carries a 50% extra charge, and the installation of extra pallets would have been useless if the risk did not materialize.

New York harbor nor so far to the east as the experts predicted even on Sunday night, but where she would produce maximum surge and wave action. The extraordinary circumstances that developed here were thus quite different from those in *Petition of Kinsman Transit Co.*, 338 F. 2d 708, 714 (2 Cir. 1964), cert. denied, 380 U. S. 944 (1965), where the conditions requiring the exercise of care "were of the very sort that had been occurring for years, although not quite in the same degree."

There remains only the claimants' contention that the district court should have followed *World Products, Inc.* v. *Central Freight Serv., Inc.*, 222 F. Supp. 849 (D. N. J. 1963), affirmed without further discussion of this issue, 342 F. 2d 290 (3 Cir. 1965), where a warehouseman on the Jersey side of the Hudson was held liable for flooding by Hurricane Donna. Although Judge Wyatt pointed to some differences of fact between the two cases, see 241 F. Supp. at 119, determination whether these or others were significant would require us to engage in a scrutiny of the record of *World Products* as thorough as we have made of the record here. In view of the firm conclusion we have reached after full consideration of this well tried and well argued case, we do not believe that effort would be rewarding.

Affirmed.

Judgment

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

At a Stated Term of the United States Court of Appeals, in and for the Second Circuit, held at the United States Courthouse in the City of New York, on the thirteenth day of April one thousand nine hundred and sixty-six.

Present: HON. STERRY R. WATERMAN,
HON. HENRY J. FRIENDLY,
HON. IRVING R. KAUFMAN,
Circuit Judges.

MAMIYE BROS., et al.,
Libellants-Appellants,

v.

BARBER STEAMSHIP LINES, INC., et al.,
Respondents-Appellants,

ATLANTIC STEVEDORING CO., INC., and
ATLANTIC PIERS CO., INC.,
Impleaded-Respondents-Appellees.

(and two other cases)

Appeal from the United States District Court for the Southern District of New York.

This cause came on to be heard on the transcript of record from the United States District Court for

the Southern District of New York, and was argued by counsel.

ON CONSIDERATION WHEREOF, it is now hereby ordered, adjudged, and decreed that the decree of said District Court be and it hereby is affirmed with costs to the appellees, Barber Steamship Lines, Inc., et al., and to the appellees, Atlantic Stevedoring Co., Inc., and ano.

A. DANIEL FUSARO
Clerk